Respondents Berdex and Coast to Coast also argue (at 17) that the Eleventh Circuit has not clearly rejected a willfulness prerequisite, asserting that the decision in *Burger King Corp.* v. *Mason*, 855 F.2d 779 (1988), simply rejected a requirement of "bad faith." But even if that court intended to make a distinction between "bad faith" and "willful" violations, its holding would still create a circuit conflict. See, *e.g.*, *Int'l Star Class Yacht Racing Ass'n.* v. *Tommy Hilfiger, U.S.A., Inc.*, 80 F.3d 749, 753 (CA2 1996) ("In order to recover an accounting of an infringer's profits, a plaintiff must prove that the infringer acted in bad faith."); *George Basch Co.* v. *Blue Coral, Inc.*, 968 F.2d 1532, 1534 (CA2 1992) ("The district court concluded that bad faith was not a necessary predicate for an accounting. We disagree.").

In the end, however, it makes little difference whether the circuit split is four-two or four-two-five or some other complex mix. There can be no denying that the courts are substantially divided and in need of guidance from this Court.

3. Respondents Berdex and Coast to Coast nonetheless argue that this Court should allow the division on this important question to remain unresolved because petitioner did not challenge the validity of the Ninth Circuit's willfulness prerequisite in the courts below. See Berdex BIO 8-10. That suggestion has no merit.

"Any issue 'pressed *or* passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari * * * ." *Verizon Communs., Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (emphasis added, citation omitted). The Ninth Circuit plainly passed upon the question below, and respondents do not contend otherwise. See Pet. App. 7a; Berdex BIO 5.

Petitioner's failure to challenge the willfulness requirement below was also perfectly understandable.

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the cases of the Sixth Circuit is yet a further reason to grant certiorari in this case.

Respondents do not dispute that the district court and Ninth Circuit panel were bound to apply the established willfulness requirement of *Lindy Pen*. In fact, respondents were insistent that both courts were bound to that standard. In light of this established precedent, petitioner cannot be faulted for attempting to bring its case within the law of the circuit rather than asking the lower courts to overrule or disregard it.

Nor did respondents suffer any prejudice from petitioner's acceptance of established circuit precedent below. Challenging circuit precedent would not have averted any of the litigation up to this point, since neither the district court nor the court of appeals panel had the authority to set aside the circuit's established rule. Respondents suggest that, had petitioner challenged the willfulness prerequisite, they would have argued in the alternative that no award was appropriate even if willfulness was not required. But respondents already had every incentive to raise such an argument because, as they acknowledge themselves (Berdex BIO 10), petitioner vigorously argued that any willfulness requirement was satisfied in this case by respondents' willful blindness to whether they were selling products in infringing packaging. Had petitioner prevailed on that argument, respondents would have been in precisely the same position they are in now.

4. Respondents Berdex and Coast to Coast also argue (at 18-20) that certiorari should be denied because they would ultimately prevail even if this Court rejected the willfulness prerequisite. Neither the Ninth Circuit nor the district court passed on that assertion, and petitioner obviously disagrees with respondents' conclusion on where the equities lie in this case (see Pet. 19-24). But that disagreement is ultimately immaterial. The possibility that respondents would prevail under the correct standard is no reason to decline to resolve the circuit split over what the standard ought to be. If willfulness is not required, respondents will have an opportunity to convince the district court that petitioner should be denied any relief as a matter of equitable discretion.

5. Finally, petitioner suggested in its petition that the Ninth Circuit's resolution of the copyright claims in this case might require reconsideration in light of the then-impending decision in *MGM Studios, Inc.* v. *Grokster Ltd.*, No. 04-480. The decision in *Grokster* has since been rendered. See *Grokster*, 125 S. Ct. 2764 (2005). Having reviewed it, petitioner does not believe that a remand on the copyright question would be warranted. Accordingly, the petition for certiorari should be granted limited to the first question, reviewing the judgment below only as it applies to the Lanham Act claims against respondents Berdex Seafood, Inc., Coast to Coast Seafood, Inc., and Fishery Products International, Inc.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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